IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5712 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIRMALA R DAVE

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 5712 of 2004
MS AMRITA M THAKORE for Petitioner No. 1
MS DHARMISHTA RAVAL for Respondent No. 1
MS PJ DAVAWALA for Respondent No. 1
SERVED BY RPAD - (N) for Respondent No. 2
NOTICE SERVED for Respondent No. 2,3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 23/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. Rule. Ms.Davawala learned Additional Standing Counsel waives for the respondents. Heard the learned counsel Mr.Joshi for the petitioner and Ms.Davawala learned Additional Standing Counsel for the respondents.

#. The petitioner Smt.Nirmala Dave is stated to be invalid and suffering from paralysis due to which she has lost her speech. She was served with a show cause notice dated 25.05.2002 for the alleged contravention of provisions of Section 9(1)(d) of the Foreign Exchange Regulations Act, 1973. She had denied the allegations made in the show cause notice, however, by an impugned order dated 29.11.2002 (Annexure `A'), the respondent no.3 held the petitioner guilty for the contravention to the extent of the face value of the cheques and 10% of the alleged premium amount and imposed a penalty of Rs.75,000/- on the sole basis of uncorroborated and unverified statements purported to have been made by one Shri Sanjay Patel.

Aggrieved by the aforesaid order at Annexure `A', the petitioner had filed appeal before the respondent no.4-appellate Tribunal on 10.01.2003 (Annexure `B') and prayed for waiver of pre-deposit of the penalty in force and also prayed for grant of unconditional stay against recovery proceedings, wherein notice was issued to the petitioner on 27.05.2003 by the respondent no.2 informing the petitioner that her appeal was fixed for hearing on 23.06.2003 (Annexure `C'). However, on that day i.e. 23.06.2003, the respondent no.2 adjourned the matter to 03.09.2003 with a direction to the petitioner to serve the copy of the appeal memo and other proceedings on the respondent no.3 (Annexure `D'). Thereafter, her advocate addressed a letter dated 18.07.2003 (Annexure `E') with the copy of the appeal filed before the respondent no.2. Though the hearing of the appeal was fixed on 03.09.2003, all of a sudden on 27.08.2003 R.2 kept the matter on 07.10.2003 which was informed to the petitioner by a letter dated 27.08.2003 (Annexure `F'). It is the case of the petitioner that her advocate was already engaged in another matter before another Tribunal on 07.10.2003 at Mumbai. By an application dated 06.10.2003, her advocate applied for adjournment by sending fax to respondent no.2 (Annexure `G'). However, the respondent no.2 - appellate Tribunal dismissed the appeal of the

petitioner on 07.10.2003 on the ground that neither the appellant nor her representative was present on that day and appeal was dismissed for default of the appellant of pre-deposit of penalty and for hearing the case (Annexure `H').

The impugned order dated 07.10.2003 Annexure `H' was received by the advocate of the petitioner on 21.10.2003 and on 20.11.2003 she had filed an application before the respondent no.2 for restoration of her appeal (Annexure `I') along with affidavit dated 18.11.2003 of her advocate (Annexure `J'). Thereupon, respondent no.2 issued notice on 28.11.2003 to the petitioner fixing the date of hearing on 11.12.2003 of her restoration application (Annexure `K'). However, thereafter, the advocate of the petitioner was informed on phone by registry official of the respondent no.2 that the matter was adjourned to 18.12.2003 instead of 11.12.2003. Accordingly, her advocate remained present on 18.12.2003 before the respondent no.2 but the advocate of the respondent no.3 submitted that no notice in the restoration application was received by them. Therefore, the matter was adjourned to 05.02.2004 by an order dated 18.12.2003 (Annexure `L') passed by the respondent no.2.

Thereafter, the hearing of the restoration application was fixed on 05.02.2004 but before that on 16.01.04, the respondent no.2 kept the matter on 05.03.04 instead of 05.02.04 (Annexure `M') but the letter was posted only on 20.02.04. Therefore, her advocate was not in know of it and remained present before the respondent no.2 at Delhi on 05.02.04. There he came to know from the registry official of the respondent no.2 that matter was already adjourned to 05.03.04. Thereafter, on 26.02.04, her advocate addressed a letter to respondent no.2 praying for adjournment on the ground that he was required to attend a family function at Bangalore on 05.03.04. Therefore, he would not be in a position to remain present on 05.03.04 and therefore the matter be adjourned on any other day (Annexure `N' collectively) dtd. 26.02.04 and 05.03.04. However, without referring and considering the application of the petitioner, the respondent no.2 dismissed the restoration application on 05.03.04 (Annexure `O') in absence of the applicant and her advocate. Hence, the petitioner approached this court by way of this petition filed under Article 226 and 227 of the Constitution and prayed that the impugned orders dated 07.10.2003 (Annexure `H') and 05.03.04 (Annexure `O') respectively passed by the respondent no.2 be quashed and set aside and main appeal no.07 of 2003 of the petitioner which was dismissed for default by the

respondent no.2 be restored to the file at its original number and the same may be heard and decided on merits by the Tribunal.

#. Having heard the learned counsel for the parties Shri Mihir Joshi for the petitioner and Ms.Davawala learned Additional Standing Counsel for the respondents and having carefully gone through the impugned orders at Annexure `H' and `O' passed by the respondent no.2, we are of the considered opinion that the learned appellate Tribunal had passed the impugned orders dated 07.10.2003 (Annexure `H') and 05.03.2004 (Annexure `O') in a little haste and dismissed the appeal and restoration application on the ground that her counsel was not present.

We have already narrated in detail the events taken place in the matter. Therefore, we would not like to repeat it, suffice it to say that the respondent no.2 could have and should have adjourned the matter on 07.10.2003 on the request of the learned advocate for the petitioner as initially the hearing of the appeal was fixed on 03.09.2003 but by letter dated 27.08.2003, the Registry of the respondent no.2 informed the petitioner that her matter was kept on 07.10.2003. In the instant case, learned advocate was already engaged in his another matter before the Central Excise and Service Tax Tribunal, Mumbai. Therefore, when he had applied for adjournment on 06.10.2003, then in our considered opinion, the respondent no.2 ought to have granted the request and adjourned the matter. Instead of it, the respondent no.2 had dismissed the appeal of the petitioner for default, by its impugned order dated 07.10.2003 (Annexure `H') which was highly improper. When the sufficient cause was shown by the petitioner in her restoration application then, the respondent no.2 ought to have restored the appeal on mere perusal of the application, instead the respondent no.2 dismissed the restoration application of the petitioner for default by an impugned order dated 05.03.04 (Annexure `O'). It may be stated that the learned advocate of the petitioner did remain present on 05.02.04. However, subsequently on 16.01.04 the respondent no.2 changed the date of hearing from 05.02.04 to 05.03.04 but said communication was posted only on 20.02.04 which could not be received by the advocate for the petitioner in time, therefore, her advocate had remained present at Delhi on 05.02.04, then he came to know from the Registry of the respondent no.2 that matter was already adjourned to 05.03.04. In that view of the matter, it cannot be said that the learned advocate was negligent or careless in not remaining

present before the respondent no.2 at the time of hearing of his appeal or restoration application. It is true that on both the occasions, the learned advocate was not present. Therefore, the respondent no.2 could have dismissed the matter for default but when there was sufficient cause made out by the learned advocate for the petitioner, then the learned Tribunal ought to have restored the appeal of the petitioner and decided the same on merits in accordance with law. Instead of it, the respondent no.2 dismissed the restoration application also on the same ground of default which was not at all proper.

In view of the above discussion, this petition is allowed and the impugned order at Annexure `H' dated 07.10.2003 passed by the respondent no.2 dismissing the appeal for default is hereby quashed and set aside and the respondent no.2 is directed to restore the appeal of the petitioner on the file at its original number and decide it in accordance with law. Once the main impugned order Annexure `H' dated 07.10.2003 passed by the respondent no.2 is quashed and set aside, then subsequent order passed on restoration application on 05.03.2004 (Annexure `O') has to be quashed and set aside and accordingly it is quashed and set aside. Rule is made absolute with no order as to costs.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

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